FILE COPY

No. 580

In the Supreme Court of the United States

OCTOBER TERM, 1941

[redacted] W. HILLIER, PETITIONER,

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
Preliminary analysis	13
I. The regulation of the Civil Service Commission establishing subgroup A–1 is valid	21
1. Prior legislative and executive action has established a pattern for preferences in retention of veterans over nonveterans	23
2. The legislative history of the Veterans' Preference Act reveals a clear purpose to preserve all preference rights theretofore conferred upon veterans	30
3. The second proviso to Section 12 of the Act is an explicit command that in the event of a reduction of force there must must be given to veterans with an efficiency rating of good or better an absolute retention preference over competing non-veterans, irrespective of length of service	35
4. The establishment of subgroup A–1 is valid and constitutes a reasonable exercise of the Commission's authority to prescribe regulations	39
II. Subgroup A–1 Plus is both warranted and required by Section 8 of the Selective Training and Service Act, and the Commission's regulation recognizing that fact is valid under Section 12 of the Veterans' Preference Act	46
III. The relief which petitioner seeks is a legislative and not a judicial matter	51
Conclusion	55
Appendix A	56
Appendix B	61
Appendix C	66

CITATIONS

Cases:	
Adkins v. *Children's Hospital*, 261 U. S. 525	15
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227	15
American Tel. & Tel. Co. v. *United States*, 299 U. S. 232	23

Cases—Continued Page

Ashwander v. Tennessee Valley Authority, 297 U. S. 288 15
Billings v. Truesdell, 321 U. S. 542 53
Blake v. United States, 103 U. S. 227 21
Borak v. Biddle, 141 F. 2d 278, certiorari denied, 323 U. S. 738 16
Brown v. United States, 39 C. Cls. 255 22
Burnap v. United States, 252 U. S. 512 21
Coffman v. Breeze Corporations, 323 U. S. 316 15
DiBenedetto v. Morganthau, 148 F. 2d 223, certiorari dismissed, 326 U. S. 686 16
Electric Bond & Share Co. v. Securities & Exchange Commission, 303 U. S. 419 15
Fishgold v. Sullivan Drydock and Repair Corp., 328 U. S. 275 11, 47, 48, 49
Gray v. Powell, 314 U. S. 402 53
Helco Products Co. v. McNutt, 137 F. 2d 681 15
Humphrey's Executor v. United States, 295 U. S. 602 21
Keim v. United States, 177 U. S. 290 21
Kirkman v. MacMorland et al., 71 F. Supp. 15 36
Love v. United States, 108 F. 2d 43, certiorari denied, 309 U. S. 673 16
Lucas v. American Code Co., 280 U. S. 445 53
Lynn v. United States, 110 F. 2d 586 16
McCaughn v. Hershey Chocolate Co., 283 U. S. 488 53
Massachusetts v. Mellon, 262 U. S. 447 14
Mitchell v. Cohen, Nos. 130–131, this Term, decided March 8, 1948 41
Myers v. United States, 272 U. S. 52 21
New York, C. & St. L. R. Co. v. Frank, 314 U. S. 360 54
Parsons v. United States, 167 U. S. 324 21
Robertson v. Downing, 127 U. S. 607 54
Social Security Board v. Nierotko, 327 U. S. 358 53
Stilling v. United States, 41 C. Cls. 61 22
Trailmobile Co. v. Whirls, 331 U. S. 40 47, 48
United States v. American Trucking Associations, 310 U. S. 534 53
United States v. Burnet, 65 F. 2d 195 24
United States v. Chicago North Shore R. Co., 288 U. S. 1 54
United States v. Hill, 120 U. S. 169 54
United States v. Jackson, 280 U. S. 183 53
United States v. Perkins, 116 U. S. 483 21
United States v. Philbrick, 120 U. S. 52 54
Wallace v. United States, 257 U. S. 541 21
Wheelock v. United States, 46 C. Cls. 1 22

Statutes:

Act of March 3, 1865, Res. 29 (13 Stat. 571) 23
Act of August 15, 1876, c. 287, § 3, 19 Stat. 143, 169 (5 U. S. C. 37) 24, 31, 45
Act of August 23, 1912, c. 350, § 4 (37 Stat. 360, 413) 24, 25, 31, 36

Statutes—Continued Page

Act of August 24, 1912, c. 389, 37 Stat. 539, 555, sec. 6 (5 U. S. C. 652) 22, 24
Act of March 3, 1919, c. 97, sec. 6 (40 Stat. 1293), as amended by the Act of July 11, 1919, c. 6, sec. 1 (41 Stat. 35, 37, 5 U. S. C. 35) 24, 31
Act of June 18, 1929, c. 28, sec. 3, 46 Stat. 21 (5 U. S. C. 35; 13 U. S. C. 203) 24, 31
Act of August 8, 1946, 60 Stat. 939 54
Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, as amended, c. 522, 50 Stat. 533 (5 U. S. C. 632 *et seq.*) 21
Sec. 7 24
Federal Declaratory Judgment Act, 28 U. S. C. 400 14
R. S. 1754, 5 U. S. C. 35, sec. 1 of Act of March 3, 1865, 13 Stat. 571 2
Selective Training and Service Act of Sept. 16, 1940, c. 720, 54 Stat. 885 (50 U. S. C. App. 301 et seq.):
Sec. 8 ..... 11, 48, 49
Sec. 8 (a) 59
Sec. 8 (b) 17, 59
Sec. 8 (b) (A) 46, 49, 60
Sec. 8 (b) (B) 49, 60
Sec. 8 (b) (C) 60
Sec. 8 (c) 47, 48, 60
Veterans' Preference Act of June 27, 1944, c. 287, 58 Stat. 387 (5 U. S. C., Supp. V, 851–869):
Sec. 2 ..... 41, 56
Sec. 3 ..... 41, 57
Sec. 7 ..... 41, 42, 57
Sec. 12 ..... 2, 9, 10, 22, 23, 36, 39, 41, 42, 53, 54, 58
Sec. 18 59

Miscellaneous:
Borchard, *Declaratory Judgments* (2d ed., 1941), p. 373 16
5 C. F. R., 1943 Supp., 12.301–12.313 ..... 28, 38
5 C. F. R. (1945 Supp.) sec. 12.302 ..... 4, 5, 37, 38, 61
5 C. F. R. (1945 Supp.) sec. 12.302 (c), as amended, 11 Fed. Reg. 8205, 9003, 9977 ..... 4, 61
5 C. F. R. (1945 Supp.) sec. 12.303 ..... 3, 63
5 C. F. R. (1945 Supp.) sec. 12.307 4
5 C. F. R. (1945 Supp.) sec. 12.308 4
Civil Service Annual Report for 1945 (p. 25) 49
Civil Service Rule XII, as amended by Exec. Order 3801 of March 3, 1923, and Exec. Order 5068 of March 2, 1929 ..... 26, 28
90 Cong. Rec. 1233 30
90 Cong. Rec. 2401 30
90 Cong. Rec. 3156 30
90 Cong. Rec. 3501–3507 ..... 30, 31, 32, 33, 34
90 Cong. Rec. 4959 30
90 Cong. Rec. 5785 30

Miscellaneous—Continued

	Page
90 Cong. Rec. 6283	30
90 Cong. Rec. 6712	30
Departmental Circular No. 146, U. S. Civil Service Commission, Oct. 22, 1936	26
Departmental Circular No. 556, Supplement No. 2, U. S. Civil Service Commission, Nov. 1, 1946	50, 51
Executive Order 3567, Oct. 24, 1921, Sec. 7	25, 26
Executive Order 3801, Mar. 3, 1923	26, 36
Executive Order 4240, June 4, 1925	26, 36
Executive Order 5068, Mar. 2, 1929	26, 36
Executive Order 9063, Feb. 16, 1942 (7 Feb. Reg. 1075)	25
Federal Personnel Manual, Ch. E 1, p. 5, Nov. 24, 1947, Mar. 2, 1948	19
Hearings before the Committee on Civil Service, U. S. Senate, on S. 1762 and H. R. 4115, 78th Cong., 2d sess.	29, 30, 33, 34, 44
H. R. 882, 78th Cong., 1st sess	43, 44
H. R. 4115, 78th Cong., 2d sess	30, 43
H. Rep. 1289, 78th Cong., 2d sess	30, 31, 32, 45, 47
40 Op. A. G. No. 115 (Sept. 20, 1946)	17, 48, 50
S. 1762, 78th Cong., 2d sess	30
S. 2327, 80th Cong., 2d sess	55
S. Rep. 907, 78th Cong., 2d sess	30, 31

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 560

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 51–52) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 53–56) is reported at 165 F. 2d 251.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The petition for a writ of certiorari, filed on January 30, 1948, was

granted on March 8, 1948 (R. 59). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Civil Service Commission regulations granting to veterans with an efficiency rating of "Good" or better, a retention preference over nonveterans, without regard to length of service, are valid as required or authorized by Section 12 of the Veterans' Preference Act of 1944.

2. Whether the Civil Service Commission regulations granting to newly-returned veterans a one-year retention preference over all other competing employees, whether veteran or nonveteran, are valid as required or authorized by Section 8 of the Selective Training and Service Act and Section 12 of the Veterans' Preference Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in Appendices A and B, *infra*, pp. 56–60, 61–65.

STATEMENT

Section 12 of the Veterans' Preference Act of 1944 authorizes the Civil Service Commission to promulgate regulations governing reduction in personnel, "which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." It further provides that "preference employees whose efficiency rat-

ings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *." The regulations issued pursuant to this section (5 C. F. R. (1945 Supp.) § 12.303, Appendix B, *infra*, pp. 61–65), provide in general for the division of civilian government employees into the following three groups according to their tenure of employment:

Group A, permanent employees;
Group B, employees serving under appointments with a time limitation which exceeds one year;
Group C, employees serving under appointments with a time limitation of one year or less.

Group A, in turn, is subdivided into five subgroups, as follows:

Subgroup A–1 Plus, Veterans for a one-year period after return to duty;
Subgroup A–1, Veterans with "good" (or higher) efficiency ratings;
Subgroup A–2, Nonveterans with "good" (or higher) efficiency ratings;
Subgroup A–3, Veterans with efficiency ratings lower than "good";
Subgroup A–4, Nonveterans with efficiency ratings lower than "good" (*ibid.*):

Employees in each subgroup are assigned retention credits by allowing one point for each full

year of government service, including military service, plus five points for an "excellent" efficiency rating, three points for "very good," and one point for "good." 5 C. F. R. (1945 Supp.) § 12.302 (c), as amended, 11 Fed. Reg. 8205, 9003, 9977. Employees are listed in their respective subgroups in the order of their total retention points (*id.*, § 12.307), and reductions in force are made in any competitive level by starting with the lowest subgroup, i. e., subgroup C–4, and selecting employees for separation in the inverse order of the number of their retention credits (*id.*, § 12.308). "Competitive level" is defined as "all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible" (*id.* § 12.302 (j)). For example, the P–5 attorneys in a government agency (or other competitive area as defined in the regulations) are in competition with each other, but are not regarded as competing with P–4 or P–6 attorneys. Thus, where a reduction in force occurs, P–5 attorneys are released by starting with those in subgroup C–4 with the lowest number of retention points.

Petitioner was employed at the United States Navy Yard, Charleston, South Carolina, as a permanent employee in the classified civil service (R. 3). Because of petitioner's nonveteran status, he had been placed in retention group A–2 (R. 21). On January 7, 1946, petitioner was

rerated from leadingman shipfitter to shipfitter maximum due to reduction in work at the Yard (R. 14–15).[1] On November 8, 1946, petitioner was furloughed without pay for a period of one year because of reduction in force (R. 22–25)[2] although competing employees in the A–1 Plus and A–1 subgroups, with less service than petitioner, were retained in active service (R. 4). The placing of petitioner on furlough in the reduction of personnel was effected in accordance with the foregoing regulations.[3] At the time of his furlough, petitioner had a total of more than twelve years of government service and had an "excellent" efficiency rating (R. 24).

Petitioner thereafter brought the instant action for a declaratory judgment, mandamus, and other

[1] Some confusion has arisen in respect of the supervisory position which petitioner held. Exhibit A to the stipulation (R. 14) states that he was rerated from quarterman shipfitter to leadingman shipfitter. That is incorrect. We have obtained a certified copy of original which recites that petitioner was rerated from leadingman shipfitter to shipfitter maximum. Otherwise, the original and Exhibit A correspond.

[2] The Commission has defined "reduction in force" as meaning "the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former employee with established reemployment or restoration rights, or for other reasons." 5 C. F. R., 1945 Supp., Sec. 12.302 (a).

[3] It is not contended that petitioner's separation was not effected in full compliance with the regulations promulgated by the Commission.

relief (R. 2–6). He alleged that the regulations of the Civil Service Commission establishing the A–1 Plus and the A–1 subgroups, gave retention preference to veterans over nonveterans "with no regard whatsoever to relative length of service * * *" and were "unreasonable, arbitrary and capricious, without statutory warrant, and contrary to the express provisions of Sec. 12 Veterans' Preference Act of 1944 * * *"; and that the application of these regulations by the Secretary of Navy had unlawfully deprived him of his office as Leadingman Shipfitter (R. 4). After answer (R. 6–8), both petitioner and respondents moved for summary judgment on the grounds that there was no genuine issue as to any material fact, and that judgment should be entered as a matter of law (R. 9, 51). Petitioner's motion was supported by his affidavit (R. 10–12) and, pursuant to a stipulation (R. 13), eight exhibits relating to the policy and circumstances surrounding the dismissal of petitioner were introduced into the record (R. 14–50). The trial court denied petitioner's motion and granted summary judgment for respondents (R. 52). It stated that "the regulations complained of are consistent with the letter and spirit of the Veterans' Preference Act and are in harmony with the Congressional purpose as indicated by the legislative history of the act" (R. 51). On appeal, the court below affirmed, holding that the challenged regulations were a reasonable method

of applying the general command of Section 12 of the Act that, when reductions of personnel are made in the government service, competing employees shall be discharged in accordance with regulations of the Civil Service Commission which shall give due effect to tenure of employment, length of service, military preference, and efficiency ratings (R. 53–56). The court said (R. 56):

> From a practical point of view, we think that Congress meant to give the Commission a wide measure of discretion in the formulation of rules to deal with the difficult administrative problem arising from the reduction of federal employees and the complications of veterans' rights. It did not, we think, mean to foreclose the Commission by unequivocably requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel. But we think that Congress left that difficult solution largely to the Commission, and so long as the Commission stays within the reasonable limits of the "due effect" directive, the courts must leave it there.

That court, however, rejected the Government's contention that the Commission's regulations were required by law, stating (R. 55–56):

* * * * *

At the same time, we do not think, as appellees argue, that the regulations as drawn represent the only possible method of applying the statute. The proviso in Section 12 is that preference employees shall be retained in preference to all other "competing" employees. We think that that refers to employees competing within the bounds of such classifications as the Commission may establish by regulations, giving "due effect" to the four factors named. The regulations as drawn refer to "competitive retention groups and subgroups." The Commission could establish classifications, or groups, by a composite consideration of the four factors, and only those employees falling within a particular classification or group would be "competing."

* * * * *

SUMMARY OF ARGUMENT

Not all the questions which petitioner undertakes to raise may be adjudicated in this action, which is one primarily for a declaratory judgment that subgroups A–1 Plus and A–1 be declared invalid, coupled with a prayer that the Secretary of the Navy be directed to restore petitioner to his job as leadingman shipfitter. Subgroup A–1 Plus includes only veterans entitled to reemployment for one year over veterans and nonveterans alike, and subgroup A–1 confers retention benefits upon veterans over nonveterans Accordingly, petitioner is not in a position to question the superseniority raised by subgroup A–1 Plus as that

group operates only to confer special benefits upon a certain group of veterans. If it were invalid, the persons listed therein would fall within subgroup A–1. Inasmuch as all positions in the shipfitter's department at the Charleston Navy Yard are occupied by veterans, petitioner may not be restored unless subgroup A–1 is held invalid. Accordingly, the only issue in this case is the validity of subgroup A–1, which concededly can affect petitioner's right to reemployment.

I

Subgroup A–1 is valid.—Petitioner has no vested right to retention in government service other than that conferred by statute or regulation, as it is settled law that the power to appoint vested in the Executive branch of the Government normally carries with it the power to remove. What rights to retention petitioner has stem from Section 12 of the Veterans' Preference Act, but that section supports the classifications set up by the Civil Service Commission.

1. Prior legislation extending back seventy years has created a pattern of veterans' preferences, particularly preference in retention. Under prior statutes and executive orders, an honorably discharged veteran whose efficiency rating was "good" or better was entitled to be retained in any reduction of force over a nonveteran, irrespective of the latter's efficiency rating or length of service.

2. The legislative history of the Veterans' Preference Act discloses that it was intended to codify and strengthen veterans' preferences as established by prior statutes and executive orders. No substantial privilege was to be taken from the veterans.

3. The plain language of the second proviso to Section 12 of the Veterans' Preference Act, which provides that in any reduction in force, preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees, discloses on its face that it was intended to continue to grant veterans the same preference in retention that they had enjoyed under prior statutes and executive orders.

4. Even assuming that the second proviso to Section 12 does not have the force which we ascribe to it, nevertheless the Commission was given authority to promulgate regulations to be applicable in the event of a reduction of force and the standards to which the Commission was to give effect are tenure of employment, military preference, length of service, and efficiency ratings. The relative weight to be given to these factors was, by the statute, left to the discretion of the Commission. In formulating the regulations setting up the A–1 Plus, the A–1, and A–2 subgroups, the Commission did consider and give force to all of these elements. Petitioner's complaint that it failed to give greater force to length

of service than it did to veterans' preference is, we submit, not persuasive. The statute entrusted to the Commission exclusively the function of determining the weight to be given to each factor, and it cannot be said that the Commission has so far departed from the statutory standards as to justify setting aside the regulations.

II

Subgroup A–1 Plus is valid.—As before noted, petitioner is not in a position to question the validity of this subgroup unless subgroup A–1 be held invalid and, even then, it is extremely doubtful that he can show that he is adversely affected by the existence of this subgroup. However, Section 8 of the Selective Training and Service Act expressly provides that a person returning to government service from military service shall, under specified conditions, be restored to the position which he left with the same seniority and salary, and that he shall not be removed therefrom without cause for a period of one year. *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275, is not to the contrary. That case dealt with the return of a veteran to private employment, and the actual holding of the court was that where the veteran was furloughed for short periods of time pursuant to the terms of a union contract, it did not violate the nondischarge provision of Section 8 of the Selective Training and Service Act.

Petitioner's contention that this subgroup should be set aside in any event, because the Commission believed it was required to create this group by law and did not do so as a matter of discretion, is without merit. In the first place, we submit that the law requires the Government at least to grant unconditional reemployment to a returning veteran for a period of one year and, second, that while the Commission promulgated this regulation as a matter of law prior to the decision in the *Fishgold* case, thereafter it retained the regulation, setting up subgroup A–1 plus as a matter of judgment.

III

The relief which petitioner seeks is of a character that can be afforded only by Congress.—Petitioner seeks to set aside the Commision's regulations as not in accordance with the statute. Not only is the Commission's interpretation of the statute entitled to great weight, but, in any event, Congress has been fully aware of the manner in which the statute is being administered by the Commission, and, owing to the great interest which Congress has manifested in veterans' affairs, it cannot be presumed that it is allowing the Commission to proceed in a manner diametrically opposed to its intention. While undoubtedly petitioner has suffered personal hardship, his remedy lies with Congress, and not with the courts.

ARGUMENT

PRELIMINARY ANALYSIS

At the outset, and particularly in light of Point III of petitioner's brief, we believe it desirable to reexamine petitioners' complaint, the relief he sought in the District Court, as well as the type of relief which that court has jurisdiction to grant, for the purpose of determining the precise issues raised by this case.

In his complaint, petitioner directs his allegations principally to his demotion from leadingman shipfitter to shipfitter maximum (paragraphs 4, 12, 13; R. 3, 4, 5). He claims that the Civil Service Regulations establishing the A–1 Plus (veterans who have been back for less than one year) and A–1 (veterans with "good" or better efficiency ratings) retention groups and placing him in A–2 retention group (nonveterans with "good" or better efficiency ratings) are invalid, and prays, *inter alia*, that the Secretary of the Navy be ordered to restore him forthwith to his job as leadingman shipfitter at the Charleston Navy Yard. But the issues which he undertakes to raise, and to which he devotes the greater portion of his argument in his brief in this Court, do not deal with that job at all, but rather with the job of shipfitter maximum to which he had been rerated as of January 7, 1946, and from which he was furloughed on November 8, 1946. The complaint was never amended to conform to the

changed position, and it is extremely doubtful that under the complaint as filed he is entitled to be restored to his position of shipfitter maximum unless this Court sees fit to read specificity into his fourth prayer, which was for "such other and further relief as is just."

Assuming, however, that this Court is of the opinion that the complaint sets out a cause of action in regard to petitioner's being placed on furlough from the position of shipfitter maximum, not all of the legal questions formulated by petitioner are, we submit, presented here. Petitioner brought this proceeding under the Federal Declaratory Judgment Act (28 U. S. C. 400) to obtain a judgment declaring the legal relationships of the parties, and he prays for a declaration that the Civil Service Regulations, which establish the A–1 Plus and A–1 groups granting retention preference to veterans as against nonveterans, are, as he claims, void and of no effect and unlawful in their application to petitioner. He further prays that the members of the Civil Service Commission be directed to rescind the present regulations and promulgate new ones in conformity with the requirements of Section 2 of the Veterans' Preference Act of 1944 as declared by this Court.

In determining the issues which petitioner may here raise in regard to the validity of the Civil Service Regulations, it must be remembered that courts "have no power *per se*" to pass upon all questions raised before them. *Massachusetts* v.

Mellon, 262 U. S. 447, 488; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 544; *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324, 325, and cases cited. There must be present a justiciable "case or controversy" in the constitutional sense properly raising a question before the federal courts can assert jurisdiction to pass upon it. *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325. A prayer for a declaratory judgment under the Federal Declaratory Judgment Act does not add to the jurisdiction of this Court to grant relief since that Act applies only to "cases of actual controversy," a phrase which "has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–240. In short, the Federal Declaratory Judgment Act is procedural only and does not enlarge the jurisdiction of the district courts. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324, 325; *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419, 443; *Helco Products Co.* v. *McNutt*, 137 F. 2d 681 (App. D. C.).

Tested in the light of these criteria, it is clear that petitioner is entitled to seek a declaratory judgment as to the validity of the Civil Service Regulations only if these Regulations have a direct impact upon petitioner so that he would be entitled to restoration to his position or a least the

possibility thereof.[4] Such relief might be given petitioner if it were held that the regulations adopted are invalid and that there is reasonable ground to believe that under new and valid regulations petitioner might be entitled to be restored to his former position.[5] Thus if this Court should set aside the regulation establishing subgroup A–1, and the Civil Service Commission were to promulgate new regulations, petitioner under such new regulations might become entitled to reinstatement to the position of shipfitter maximum from which he was involuntarily furloughed. To that extent, the regulation here attacked results in direct injury to petitioner, and the issue he raises as to its validity, accordingly, is a justiciable one which can be determined by this Court.

On the other hand, the regulation establishing the A–1 Plus retention group, which petitioner also attacks, has no such direct impact upon him

[4] Petitioner is, of course, not entitled to, nor apparently does he here seek, a declaratory judgment that he was illegally discharged for the purpose of recovering back salary. District courts are by statute denied jurisdiction to entertain suits for back salary, such jurisdiction being vested exclusively in the Court of Claims. *Love* v. *United States*, 108 F. 2d 43, 50 (C. C. A. 8), certiorari denied, 309 U. S. 673; *Lynn* v. *United States*, 110 F. 2d 586 (C. C. A. 5); *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C.), certiorari denied, 323 U. S. 738; *DiBenedetto* v. *Morgenthau*, 148 F. 2d 223 (App. D. C.), certiorari dismissed, 326 U. S. 686; Borchard, *Declaratory Judgments* (2d ed., 1941), p. 373.

[5] Such relief would also be available if the retention list had not been adhered to and persons below petitioner on the list had been retained in preference to petitioner. The complaint, however, is bare of any such allegation.

independently of the validity of the A–1 group.[6] The A–1 Plus classification is simply a subdivision of A–1 which also encompasses only veterans and is limited to veterans who have been back on the job for less than one year. It establishes a relative preference between different classes of veterans and does not bear on the relative retention rights of veterans *vis a vis* nonveterans. See 40 Opinions of the Attorney General No. 115 (September 20, 1946). If subgroup A–1 is sustainable under Section 12 of the Veterans' Preference Act, then the fact that the veterans in A–1 Plus have "super seniority" cannot affect a nonveteran, because the preference of the persons in subgroup A–1 Plus, necessarily being veterans, would be reduced, if that category were abolished, only to the extent of placing them in group A–1. Those persons, if their efficiency ratings were "good" or better, would still be entitled to priority in retention over petitioner. Accordingly, petitioner clearly has no standing to attack the validity of the A–1 Plus group unless he first succeeds in persuading this Court that the A–1 group is invalid.[7]

---

[6] It should be noted that petitioner does not deny that Section 8 (b) of the Selective Training and Service Act requires the Government to reemploy veteran employees; instead, he merely asserts that Section 8 neither requires nor authorizes the creation of retention subgroup A–1 Plus.

[7] We do not, in any manner, concede that the A–1 Plus classification is improper. On the contrary, we believe, as we show *infra*, pp. 46–51, that the classification is entirely valid.

Even if the A–1 group is invalid, petitioner might not be in a position to attack the A–1 Plus group, since, because of his high position in the A–2 group (petitioner being one of the last shipfitters furloughed), the invalidation of A–1 group alone, with the consequent dropping of a number of veterans below him on the retention list, would probably result in petitioner's being entitled to reinstatement to his job. In these circumstances, the continued existence of the A–1 Plus category would not be an immediate threat to petitioner, inasmuch as A–1 Plus is only a temporary classification, the effect of which has already been largely dissipated.

Petitioner seeks to evade the logic of these arguments by contending that 61 members of the A–1 Plus category at the time that he was dismissed[8] were marked "no efficiency." This, he assumes, means an efficiency less than "good," and hence that they should have been placed in subgroup A–3, a category below A–2 (the petitioner's group) and thus dismissed before him. This argument, however, is unfounded. At the Charleston Navy Yard, it had been customary to give efficiency ratings every six months. The persons who were marked "no efficiency" had not been there sufficiently long to be rated in the normal

[8] The particular A–1 plus retention group to which petitioner addresses his entire argument in this phase of the case are shipfitters (R. 25–28). There was, in fact, no A–1 plus retention group among the leadingmen shipfitters (R. 20–21).

course, and it was not believed necessary that they be rated other than in normal course, because, owing to their A–1 Plus classification, they were entitled to retention for a period of one year. Had it been deemed necessary or desirable, they would doubtless have been given a provisional rating of "good" or their last official rating as is now required in all such cases. Federal Personnel Manual, Chapter E 1, p. 5, November 24, 1947, March 2, 1948. It is significant, moreover, that of these 61 men, 60 are now in group A–1 with an efficiency rating of "good" or better, and that the 61st man resigned from the service before he received any rating.[9] Accordingly, all who originally constituted the A–1 Plus group are now in the A–1 group with efficiency ratings of "good" or better, and any order of the District Court which sought to restore petitioner to his former position would have to hold that he was entitled to displace one of these men. This, we

[9] It is, of course, obvious that the men in the A–1 Plus subgroup at the time petitioner filed his complaint (November 19, 1946) must have been transferred to some other subgroup as A–1 Plus is a subgroup in which a veteran can remain only for a year. We thought it important that the Court be advised of the present situation and accordingly asked the Secretary of the Navy for information as to what had happened to the men who were in A–1 Plus at the time the complaint was filed, and as to what the present situation is. (See Appendix C, *infra*, pp. 66–68.) There is set forth in Appendix C, *infra*, pp. 68–70, a letter from the Secretary of the Navy, written in response to this inquiry, which sets forth the facts in respect to the shipfitter group at the Charleston Navy Yard at the present time.

submit, cannot be done unless petitioner can show that the A–1 group has no support in law.[10]

We do not understand petitioner now to contend that he is entitled forthwith to restoration to his former job, but that his present position is that, should this Court hold that subgroups A–1 plus and A–1 are invalid, the case should be returned to the District Court with instructions to that court to withhold its "mandate" until new regulations are promulgated (Pet. Br. pp. 79–80). It thus appears that petitioner accepts as a fact that the vital issue in this case is the validity of the regulation granting absolute priority in retention to veterans with a "good" or better efficiency rating.

We accordingly submit that if the regulation establishing subgroup A–1 is held to be valid, petitioner is entitled to no relief. It is only in the event that subgroup A–1 is held invalid that the question of the validity of subgroup A–1 Plus could be reached, and even then it is not clear that its existence would affect petitioner's reemployment rights, as he doubtless has retention credits in excess of many veterans in the shipfitting department presently classified A–1.

[10] We are advised that at the present time there are 11 men in the A–1 plus category of shipfitters at the Charleston Navy Yard, all of whom, pursuant to present regulations, have an efficiency rating, and that the efficiency ratings of these men are all "good" or better. There are now no non-veterans in the shipfitters' department.

I

THE REGULATION OF THE CIVIL SERVICE COMMISSION ESTABLISHING SUBGROUP A-1 IS VALID

It is well settled that petitioner has no general and undefined right to retention in government service solely by virtue of his civil service status. While Congress may limit and restrict the power of removal (*United States* v. *Perkins,* 116 U. S. 483, 485), the normal rule is that, absent any express contrary provision, the power of removal is an incident of, and follows, the power of appointment. *Parsons* v. *United States,* 167 U. S. 324; see *Blake* v. *United States,* 103 U. S. 227, 231; *Keim* v. *United States,* 177 U. S. 290, 293–294; *Burnap* v. *United States,* 252 U. S. 512, 515; *Wallace* v. *United States,* 257 U. S. 541, 544; *Myers* v. *United States,* 272 U. S. 52, 160–161; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 629. Such right as petitioner may have to retention in the government service therefore must be a right which is specifically conferred by statute.

The controlling statute which here restricts the exercise of the removal power vested in an appointing officer is Section 12 of the Veterans' Preference Act of 1944, *infra,* pp. 58–59, which alone applies when reductions of personnel become necessary because of lack of funds or lack of work. This is clear since the basic Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, as amended, c. 522, 50 Stat. 533 (5 U. S. C. 632 *et seq.*), con-

tains no reference to removal except for a general prohibition against removals for political reasons or on account of marital status. That Act is concerned principally with the method of exercising the power of appointment and is silent as to the status and rights of employees once appointed. The Act of August 24, 1912, c. 389, 37 Stat. 539, 555, Sec. 6 (5 U. S. C. 652), which provides for the preferring of charges and opportunity to answer in the case of removals, is addressed to removals "for cause" and is not applicable to removals necessitated by an administrative exigency not personal to the employees, such as removals because of lack of work or lack of funds. Cf. *Stilling* v. *United States*, 41 C. Cls. 61, 66; *Brown* v. *United States*, 39 C. Cls. 255, 256–257. *Wheelock* v. *United States*, 46 C. Cls. 1, 5.

Any rights which petitioner may have to retention in government service, therefore, must be based squarely on Section 12 of the Veterans' Preference Act and the regulations promulgated pursuant thereto. It is our contention that the regulation of the Civil Service Commission, establishing subgroup A–1 which grants an absolute retention preference over nonveterans to veterans with a rating of "good" or better, was required by the second proviso to Section 12, or that, in any event, it was a permissible exercise of the authority to promulgate regulations entrusted by Congress to the Commission.[10a] This

[10a] Petitioner contends (Br. p. 30), that the regulations in the A–1 group were adopted by the Commission in the mis-

we think follows not only from the plain language of Section 12, but also from the history of the preferences which have been extended to veterans of the armed services for over seventy years and which established a pattern of veteran preferences, and from the legislative history of the Veterans' Preference Act which clearly discloses that it was the intent of Congress to retain an absolute retention priority for veterans.

1. *Prior legislative and executive action has established a pattern for preferences in retention of veterans over nonveterans*

It has been the settled policy of the United States for a period of over 70 years to extend benefits with respect to employment and retention in government service to those who have served in its armed forces. Retention preference [11] was first

taken belief that they were required by law and that they should be set aside with directions to the Commission to formulate new ones, based exclusively upon its informed discretion. The short answer is that petitioner has not proved his premise, and there is nothing to show that the Commission formulated the present regulations in the belief that no other course was open to it. Compare subgroup A–1 Plus where the regulation recites that it was required by law although it now appears that the Commission retains it as a matter of discretion (see *infra*, pp. 50–51). Arguments by counsel for respondents in briefs or otherwise that the statute requires the preference in retention does not make the adoption of the regulations in question involuntary on the part of the Commission. Compare *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232, 241.

[11] Employment preference to disabled veterans was first granted by the Act of March 3, 1865, Res. 29 (13 Stat. 571)

granted veterans by the Act of August 15, 1876, c. 287, § 3, 19 Stat. 143, 169, 5 U. S. C. 37, which provided in part as follows:

> * * * In making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors.

This legislative policy was broadened and affirmed by the Act of August 23, 1912, c. 350, § 4 (37 Stat. 360, 413), which contained the following proviso:

> * * * in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.[12]

---

and was reaffirmed by Section 7 of the Civil Service Act of 1883, 22 Stat. 403, 406 (5 U. S. C. 638). Subsequent enactments show a continuing legislative policy to grant employment preference to honorably discharged veterans. See Act of March 3, 1919, c. 97, § 6 (40 Stat. 1293) as amended July 11, 1919, c. 6, § 1 (41 Stat. 37). Cf. Act of June 18, 1929, c. 28, § 3, 46 Stat. 21 (5 U. S. C. 35).

[12] Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555 (5 U. S. C. 652), which provides that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service" must be read in the light of this section. See *United States* v. *Burnet*, 65 F. 2d 195, 196–197 (App. D. C.).

Although the foregoing statutes did not provide a centralized authority for administration,[13] they clearly constituted an unconditional Congressional mandate to the executive branch to accord veterans absolute retention preference over non-veterans, without regard to relative length of service and subject only to the requirement of a good efficiency rating.

Subsequent executive orders and regulations implemented and expanded the legislative policy established by the foregoing statutes. Pursuant to Section 4 of the Act of August 23, 1912, *supra*, the President, by Executive Order 3567 of October 24, 1921, directed that, in the event of demotions and dismissals of personnel in the classified departmental service, "honorably discharged soldiers and sailors whose ratings are good shall be given preference in selecting employees for retention."[14] On March 3, 1923, retention preference was extended to veterans in the field service by

[13] Authority to enforce the regulations with respect to retention in government service was finally centralized in the Civil Service Commission by Executive Order 9063 of February 16, 1942 (7 Fed. Reg. 1075).

[14] Section 7 of Executive Order 3567 provided in part: "* * * In cases of reductions in the number of employees on account of insufficient funds or otherwise, necessary demotions and dismissals shall be made in order, beginning with the employees having the lowest ratings in each class, but honorably discharged soldiers and sailors whose ratings are good shall be given preference in selecting employees for retention."

Executive Order 3801,[15] and in 1936, by order of the President, to government positions not under civil service.[16] While length of service was given limited recognition for retention purposes for the first time by Executive Order 4240 of June 4, 1925,[17] that order reaffirmed the policy of granting abso-

[15] Executive Order 3801 amended Civil Service Rule XII by the addition of Paragraph 5. It read in part, as follows: "5. In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good."

[16] Departmental Circular 146, U. S. Civil Service Commission, October 22, 1936.

[17] Executive Order 4240 provided in part as follows:

"EMPLOYEES ELIGIBLE FOR MILITARY PREFERENCE

"1. Executive order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors, and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition.

"EMPLOYEES NOT ENTITLED TO MILITARY PREFERENCE

"2. When preparing lists from which to select employees for demotion or separation on account of reduction of force, credits for length of service will be added to all efficiency ratings of 85 or higher, as follows:

"0.1 for the first full year of Government service.

lute retention preference to veterans with "good" or better efficiency ratings. Only as against veterans with efficiency ratings lower than "good" were nonveterans given retention rights by reason of greater length of service. This limited recognition of length of service was further narrowed by

---

"0.2 for the second full year of Government service.
"0.3 for the third full year of Government service.
"0.4 for the fourth full year of Government service.
"0.5 for the fifth full year of Government service.
"0.6 for the sixth full year of Government service.
"0.7 for the seventh full year of Government service.
"0.8 for the eighth full year of Government service.
"0.9 for the ninth full year of Government service.

and one point for each year thereafter, except that the maximum credit for length of service shall not exceed 25 points. The period of service shall be computed from the date of original employment, whether as a classified or unclassified employee in the civil service of the United States, and shall include periods of service at different times and services in one or more departments, branches, or independent offices of the Government, and shall also include service performed under authority of the United States beyond seas, and honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States: *Provided:* That all periods of separation from the service and so much of any period of leave of absence as may exceed six months shall be excluded. Credit will not be given for service rendered beyond retirement age. For example, an employee with 10 years of service, whose efficiency rating was 70, would receive a demotion or separation rating of 75.5 while one with 30 years or more of service and a rating of 70 would receive a demotion or separation rating of 95. Demotions and separations from each class heretofore or hereafter established by the Personnel Classification Board will be made in order beginning with the employee having the lowest rating, except that an employee with a higher rating may be demoted

Executive Order 5068 of March 2, 1929,[18] which provided that, where the efficiency ratings of both veteran and nonveteran were equal, but both were less than good, the veteran had an absolute retention preference irrespective of length of service.

Finally, it is of great significance that the reduction-in-force regulations which the Commission promulgated on July 31, 1943,[19] and which remained in effect for almost a year immediately prior to enactment of the Veterans' Preference Act of 1944, gave effect to military preference and length of service in the same manner as the present regulations. Specifically, the 1943 regulations gave retention preference, "as between

---

or separated in preference to another with a lower rating if the duties of the position to be retained cannot be acceptably performed by the employee with the higher rating after a reasonable preliminary training period. Honorably discharged soldiers, sailors, marines, and widows of such, and the wives of injured soldiers, sailors, and marines, who are not qualified for positions in the Government service, whose efficiency ratings are below 80 and therefore are not entitled to military preference, will, after having received services credits to which they are entitled, compete with other employees not entitled to military preference."

[18] Executive Order 5068 amended paragraph 5 of Civil Service Rule XII (see note 15, *supra*, p. 26) as follows:

"5. In harmony with statutory provisions, when reductions are being made in force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, *or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service.*" (Italics supplied.)

[19] 5 C. F. R., 1943 Supp., 12.301–12.313.

permanent employees in each grade, to (a) veterans with efficiency ratings of "Good" or better over non-veterans with ratings of "Good" or better, and (b) veterans with "Fair" efficiency ratings over non-veterans with "Fair" efficiency ratings. As in the present regulations, length of service and high efficiency ratings were reflected in retention credits which determined the order of release within each category. It is this treatment of military preference and length of service which Commissioner Flemming referred to when he told the Senate Committee on Civil Service, apropos of the first clause of Section 12, that "our existing reduction-in-force regulations are in harmony with that."[20] In brief, Congress was informed that under Section 12 the Commission would continue to give effect to the factors of military preference and length of service in the same manner as it had done in the existing regulations adopted in 1943. Here too, is the true explanation of the Commission's objection to Section 12 as originally drafted to require release of employees in the inverse order of total Federal service (including military service), on the ground that consideration should be given to the relative efficiency of employees. In the light of the 1943 regulations, it is perfectly clear that the Commission was only concerned that the original draft

[20] Hearings, Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. (1944) 27.

would preclude it from giving preference to nonveterans with "Good" efficiency ratings over veterans with lower ratings and from giving any retention credits for efficiency. Cf. Pet. Br. 50–54.

From the foregoing it is clear that, from 1876 until the enactment of the Veterans' Preference Act of 1944, the Government had followed a continuous policy of granting to veterans with "good" or higher efficiency ratings absolute preference in retention in employment over nonveterans without regard to length of service.

2. *The legislative history of the Veterans' Preference Act reveals a clear purpose to preserve all preference rights theretofore conferred upon veterans*

The legislative history of the Veterans' Preference Act[21] clearly establishes a Congressional

[21] H. R. 4115 was introduced on February 3, 1944 (90 Cong. Rec. 1233), and was referred to the Committee on Civil Service. The bill was favorably reported to the House on March 27, 1944 (90 Cong. Rec. 3156; H. Rep. No. 1289, 78th Cong., 2d sess.), and passed the House on April 17, 1944, after a short discussion. 90 Cong. Rec. 3501–3507. A companion bill, S. 1762, was introduced into the Senate on March 9, 1944 (90 Cong. Rec. 2401), and hearings were held on both bills by the Senate Committee on Civil Service on May 19 and 23, 1944. Hearings before the Committee on Civil Service, U. S. Senate, on S. 1762 and H. R. 4115, 78th Cong., 2d sess. The bill was reported favorably to the Senate on May 25, 1944 (90 Cong. Rec. 4959; S. Rep. No. 907, 78th Cong., 2d sess.), and passed the Senate, as amended, without debate, on June 12, 1944. 90 Cong. Rec. 5785. The House concurred in the Senate amendments, without debate, on June 20, 1944. 90 Cong. Rec. 6283. The bill was approved on June 27, 1944. 90 Cong. Rec. 6712.

intention to consolidate and codify in one statute the several preferences available to veterans with respect to government employment, including the long established policy of according veterans absolute retention preference without regard to length of service. S. Rep. 907, 78th Cong., 2d sess. p. 1; H. Rep. 1289, 78th Cong., 2d sess. p. 1; 90 Cong. Rec. 3502, 3503, 3505.[22] The Report of the House Committee on Civil Service, H. Rep. 1289, *supra*, pp. 2–3, contains the following general statement regarding the purpose of the bill:

---

[22] The pre-existing statutory provisions granting preferences to veterans were:

(1) R. S. 1754, 5 U. S. C. 35 (from Section 1 of the Act of March 3, 1865, 13 Stat. 571): preference in appointments for veterans discharged for service-connected disability.

(2) Section 3 of the Act of August 15, 1876, 19 Stat. 143, 169, 5 U. S. C. 37: preference in reduction-in-force to "those persons * * * who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

(3) Section 4 of the Act of August 23, 1912, 37 Stat. 360, 413: preference in reduction-in-force to "honorably discharged soldier or sailor."

(4) Section 6 of the Act of March 3, 1919, 40 Stat. 1291, 1293, as amended by the Act of July 11, 1919, 41 Stat. 35, 37, 5 U. S. C. 35: preference in appointments to "honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions."

(5) Section 3 of the Act of June 18, 1929, 46 Stat. 21, 5 U. S. C. 35: same as the 1919 provision.

(6) Section 3 of the Act of June 18, 1929, 46 Stat. 21, 13 U. S. C. 203: Preference in *census* appointments to war disabled servicemen, to their widows, and to the wives of such husbands not qualified for such positions.

It has been the policy of the United States Government since the beginning of the Republic to extend certain benefits to those who have risked their lives in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veterans. These statutes have usually been in broad, general terms, and have been applied under Executive orders and regulations promulgated by the President.

For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. Careful consideration has been given to its provisions in the light of past legislation and practices. * * *

* * * The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions.

The debates in Congress (90 Cong. Rec. 3502, 3503, 3505) and the public hearings before the

Senate Committee on Civil Service (Hearings before the Committee on Civil Service, United States Senate, 78th Cong., 2d sess., on S. 1762 and H. R. 4115, pp. 8, 27) give further evidence that it was the intention of Congress to continue in effect the substance of the statutes, and to give legislative status to the several executive orders and regulations (see pp. 24–30, *supra*) which accorded veterans' preference in government employment. They clearly indicate that it was not the intention of Congress to deprive veterans of any of their then existing preferences, including the preference in retention without regard to length of service for which the 1912 act had provided.[23] But we need not

[23] In the debates in the House of Representatives Mr. Starnes of Alabama, one of the principal sponsors of the bill stated (90 Cong. Rec. 3502):

"Most of the provisions of this particular bill have been in practice for a number of years. Since World War No. 1 various Executive and administrative orders have extended to veterans throughout this country privileges in Government services. However, it is a matter of regret to me that the Congress has not heretofore established by law preference to veterans in Government employment. This is the first step in that direction. We are laying down a broad, general policy, and in some instances we are being quite specific in this bill in providing preference for veterans in Government. * * *"

Mr. Rees of Kansas commented on the bill as follows (90 Cong. Rec. 3503–3504):

"Mr. Speaker, the bill under consideration, H. R. 4155 [sic], and known as the veterans' preference bill, continues the law and Executive orders that have been in effect for a number of years providing for veterans' preference in governmental employment. * * * The bill, as I have sug-

rely upon such negative evidence, for nothing could be more explicit than Civil Service Commissioner Flemming's explanation of Section 12 to the Senate Committee (Senate Hearings p. 27); after quoting the second proviso, he stated:

> That proviso is substantially the same as a law passed by Congress in 1912, which

---

gested at the beginning, strengthens and improves veterans' legislation heretofore passed by Congress."

Mr. Ramspeck of Georgia stated (90 Cong. Rec. 3505): "It is true, Mr. Speaker, this act does not make a great many changes in the present veterans' preference, which exists largely by Executive order, but it is important, I think, that those Executive orders be given legislative status by the Congress.

"It does give some additional strength to the veterans' preference, by strengthening the Executive orders now in existence. * * *"

During the hearings before the Senate Committee on Civil Service, Mr. Starnes again stated (Hearings before the Committee on Civil Service, United States Senate, *supra*, p. 8):

"H. R. 4115 is the result of years of work by the major veterans' organizations of the country and the Civil Service Commission and the author of the bill. * * * It is the desire of the veterans' organizations that the existing Executive orders and administrative orders giving veterans preference should be adopted by the Congress of the United States as a national policy and thus give them the sanctity of legislative approval. * * * What it does is to give legislative sanction to existing veterans' preference, to the rules and regulations of the executive branch of the Government, and to broaden and strengthen those preferences * * *. There are some new provisions contained in this bill. I just want to say briefly that this bill takes away no existing veterans' preference either by statute or Executive order, but it does strengthen, broaden, and implements the veterans' preference policy heretofore in effect."

was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923.

In the light of these sweeping assurances that the proposed Act was intended to codify existing veterans' preferences and to subtract nothing therefrom, we submit that there exists a clearly established legislative intent to continue to accord to veterans with efficiency ratings of "good" or better preference in retention over nonveterans irrespective of the latters' length of service.

3. *The second proviso to Section 12 of the Act is an explicit command that in the event of a reduction in force there must be given to veterans with an efficiency rating of good or better an absolute retention preference over competing non-veterans, irrespective of length of service*

It is in the setting afforded by the long continued policy of the Government to grant an absolute preference in retention to a veteran with an efficiency rating of "good" or better, over a competing nonveteran, and the proclaimed policy of Congress in enacting the Veterans' Preference Act to codify and expand but not to sub-

tract from veterans' preferences, that the second proviso to Section 12 must be applied. It reads:

> *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *.

This language is precise, and in many aspects resembles that employed in prior retention statutes and executive orders. It commands the retention of a veteran with a "good" (or higher) efficiency rating in preference to all competing employees. Cf. *Kirkman* v. *MacMorland, et al.*, 71 F. Supp. 15, 20 (E. D. Pa.). In effect, this proviso [24] is an affirmance of the Congressional policy first announced in Section 4 of the Act of August 23, 1912, *supra*, pp. 24–25, as implemented by Executive Orders 3567, 3801, and 4240, *supra*, pp. 25–28. The regulations of the Commission, correctly, we submit, have given this proviso the normal interpretation that it withdraws from what might otherwise be the restrictive part of an act, the group or class named in the proviso.

[24] By the second clause, this proviso, which grants preference employees with a less than good efficiency rating retention preference over competing nonpreference employees with equal or lower efficiency ratings, gives legislative status to Executive Order 5068, *supra*, p. 28.

Petitioner's entire argument is in essence an attempt to interpret "all other competing employees" as meaning only those competing employees who have equal or less service than the preference eligible, and would read that language into the proviso. The short answer is that Congress did not see fit so to write the Act. Such an interpretation not only reads into the statute a qualification which is not warranted by its language but, in practical effect, would largely nullify the preference which the proviso was intended to effectuate. It fails to give the word "all" its usual significance, which would normally comprehend competing employees, irrespective of length of service; it would place preference eligibles who are not veterans themselves (e. g., widow of a veteran) and who thus have no military service to count toward length of service at a ruinous disadvantage; and it would limit the benefits which the Act confers on a veteran to a slight weighting of his efficiency rating. We submit that petitioner's construction of the proviso does violence to its plain language and the legislative intent. It should be rejected.

Moreover, the administrative practice immediately prior to the 1944 Act, is fatal to petitioner's attempt to rewrite the Act. In its present regulations, the Commission has provided for the application of the retention preferences to the employees in a particular competitive level. Sec-

tion 12.302 (j) of the regulations provides that "'competitive level' means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible." Under this definition, for example, a P–1 attorney who is a veteran is not regarded as being in competition with a P–8 nonveteran attorney with entirely different responsibilities. This is the normal meaning of "competing employees", rather than to equate competition to the number of years an employee has been in the same grade. Very persuasive evidence that the Commission's application of the term "competing employees" reflects the Congressional purpose, lies in the fact that the Commission's Reduction In Force regulations which were in effect prior to the Veterans' Preference Act of 1944, employed the same concept.[25] By enacting the 1944 statute, without defining "competing employees", Congress must be presumed to approve the existing administrative definition

[25] These regulations were issued on July 31, 1943, 5 C. F. R., 1943 Supp., 12.301–12.313. Section 12.303 provided, in part, as follows:

"* * * Within the determined organization unit, the class in which the contemplated reduction in force is to be made shall include all positions allocated to the same class, service, and grade, and all positions of the same grade (although designated by another title) that are sufficiently alike that intertransfer of personnel is feasible. In ungraded positions, the class shall include all positions in an occupational level."

and practice of *not* using length of service to determine which employees should be regarded as competitive with each other.

4. *The establishment of subgroup A–1 is valid as a reasonable exercise of the Commission's authority to prescribe regulations*

This subdivision of our argument is reached only if the Court perceives an ambiguity in the second proviso to Section 12 which is not apparent to us. But assuming, arguendo, that the second proviso does not have the force which we ascribe to it, we submit that the regulations in question are sustainable as valid and proper exercises of the power conferred upon the Commission to issue regulations, and conform substantially to the standards laid down in the first paragraph of Section 12.

Section 12 contains a general command that in reductions of personnel in the governmental civilian service, competing employees shall be released in accordance with the regulations of the Civil Service Commission which shall give "due effect" to four factors: "tenure of employment, military preference, length of service, and efficiency ratings." An examination of the challenged regulations reveals that the Commission has followed this statutory mandate, and that petitioner's contention that they give no effect to "length of service" is wholly without merit.

The Commission's regulations require, first, the division of all competing employees according to their tenure of office. Permanent employees are thus given absolute retention preference irrespective of all other criteria, and petitioner apparently concedes the correctness of the regulations in this respect (Pet. 13). Second, the regulations give weight to efficiency ratings in computing retention credits. Petitioner does not challenge them in this respect. Thus, the only issue raised in this aspect of the case is whether, as between the two remaining statutory criteria, length of service and military preference, the Commission abused its discretion in giving greater weight to military preference. We submit that it did not.

Length of service is a variable factor, subject to gradations ranging from one day to fifty years or more. It affords a direct basis for comparison between competing employees and in the majority of cases is the controlling factor in determining retention priority between veteran and veteran and nonveteran and nonveteran. There are, however, no gradations of military preference for retention purposes; it is an absolute factor.[26] An employee is either entitled to it or

[26] Petitioner urges that Section 12 provides on its face the factors which shall be given reasonable effect in determining retention in civil service, and that in no circumstances can the regulations as issued be said to fall within these (Pet. 14). Then, apparently assuming his major premise, he argues that Congress could have meant to grant "absolute prefer-

he is not. Cf. *Mitchell* v. *Cohen*, Nos. 130–131, this Term, decided March 8, 1948. The problem raised, therefore, is the relative weight which should be given to these remaining factors in determining the issue of retention in the case of competition between a veteran and a nonveteran. The Commission's regulations resolve this issue in

---

ence" only where it had specifically so provided. We agree with petitioner that the Act should be construed as a whole. However, we submit that his reference to the provisions of §§ 2 and 7, which deal with the entrance of personnel into government service, cannot be carried over into § 12, which deals with reduction in force. Section 2 is general in scope and defines the persons who shall be entitled to military preference in "certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions" in the various establishments of the Government. Section 3 specifies that in all examinations to determine qualifications *for entrance* into the service disabled exservicemen and women, the wives of disabled exservicemen who cannot themselves qualify, and their widows shall have ten points added to their earned ratings. Exservicemen and women who have served in any branch of the armed forces of the United States, during any war, or in any campaign or expedition for which a campaign badge has been authorized, and have been honorably discharged, are entitled to have five points added to their ratings. Section 7 provides that the names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings (as provided by Section 3), ahead of all others having the same rating. This clearly refers only to *entrance* registers and lists and could have no possible bearing on *retention* registers. Even assuming that Section 7 applies to Section 12 by analogy, there is no basis for petitioner's argument. Section 7 and Section 12 are similar in structure. Section 7, as previously stated, first specifies the manner in which the

favor of the veteran, thus giving a content to the term "military preference" drawn from prior statutes, executive orders and its own regulations. This decision was clearly within the Commission's competence, both under the wide discretion vested in it by Section 12 to give "due effect" to all four statutory factors and in view of the long established policy of the Government with respect to granting veterans retention preference. See pp. 24–30, *supra*.

Petitioner seeks a result which, in the case of a competing veteran and nonveteran with identical tenure and efficiency ratings, would determine the issue of retention in favor of the nonveteran because of greater length of service. Under such a view, military preference would be an operative factor in determining the issue of retention only in the case where the veteran's length of service was identical with that of the nonveteran's. We submit that, had Congress intended any such

---

names of all preference eligibles shall be entered on the appropriate appointment registers and lists of eligibles for entrance into the service. This procedure is then limited by a proviso to the effect that preference eligibles, except in the professional and scientific services, entitled to ten points (disabled exservicemen, their wives and widows) *shall be placed at the top of the appropriate register* in accordance with, that is, in the order of, their respective augmented ratings. Thus the proviso of Section 7 gives disabled exservicemen, their wives and widows, except in the professional and scientific service, an *absolute preference in entering federal service*, just as the second proviso of Section 12 gives preference eligibles with an efficiency rating of "good" or better an absolute preference in retention in federal service.

drastic change in existing law, it would have made its design patent and would not have left it to the inferences and intimations which petitioner purports to find in the Act.

It is clear, however, from the legislative history of the Act, that Congress considered the incorporation into Section 12 of such a provision and rejected it. Section 12 of H. R. 882, 78th Cong., 1st sess., the bill under consideration immediately prior to H. R. 4115, provided for the limited type of retention preference for which petitioner contends. It reads as follows:

> SECTION 12. In any reduction in personnel in any civilian service of any Federal agency employees within each classification to be reduced shall be released in the inverse order of the length of their total service: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing total length of service. * * *.

In the uccessor bill, H. R. 4115, this section was deleted and the present language of Section 12 was substituted. It was explained to the Civil Service Committee of the Senate, which had the bill under consideration during the course of the public hearings, that this change would require the discharge of nonveteran career workers with many years service in preference to veterans with as little as one year in government employ. Hearings before the Committee on Civil Service,

United States Senate, *supra*, pp. 33–34.[27] Notwithstanding this explanation, Section 12 of the bill was enacted without change.[28]

---

[27] Mr. Eliot Kaplan, Executive Secretary of the National Civil Service Reform League, in testifying before the Committee, stated:

"The third, I think you ought to give consideration to, and that is the matter of retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service.

"I have written a memorandum to the committee.

"Senator LANGER. I wonder if we could have it placed in the file? I am tremendously interested in it."

The pertinent portion of the memorandum mentioned, which was made part of the record, is as follows:

"We venture to suggest that the Starnes bill fails to impose certain minimum requirements that ought to be a part of any scheme of preference for veterans:

* * * * * *

"4. Retention in the service should be based, so far as practicable, on efficiency ratings and length of efficient service. The bill grants preferential status to all veterans, regardless of relative efficiency or length of service. A nonveteran of 25 years' service may have to be released to retain a veteran only 1 year in Government employ. This would destroy all hope of a career service based on merit and fitness and seriously affect the morale of the service as a whole."

[28] That the purpose of the substitution of the language of Section 12 of H. R. 882 for that of H. R. 4115 was to confer upon veterans preference in retention without regard to length of service is evidenced by a letter from the Civil Service Commission to the Chairman of the Committee on the Civil Service, House of Representatives, stating:

"SECTION 12. This section of H. R. 882 provided that in reductions of personnel, employees shall be released in the

Because of the established policy of the United States to grant absolute retention preference in government service to veterans with "good" or better efficiency ratings, a policy first expressed by Congress in the Act of August 15, 1876, *supra*, and implemented and expanded by subsequent statutes, executive orders and regulations, and in view of the fact that it was the avowed purpose of Congress, in enacting the Veterans' Preference Act, to codify in one statute all of the prior acts, executive orders and regulations, we submit that petitioner's argument to the effect that Congress could never have intended that nonveterans with long periods of government service should be released while veterans with substantially less government employment should be retained, is wholly without substance. Moreover, it is clear that the very construction for which petitioner contends, that military service should be given effect only in computing total length of service, was categorically rejected by Congress although the attention of Congress had been called to the fact that, as enacted, Section 12 would place nonveteran civil service employees at a considerable disadvantage in competing with veterans for retention. It follows, as the court below held, that the Commis-

inverse order of the length of their total Federal service. In accordance with the suggestion made in the Commission's letter of January 31, 1944, this section has been amended in H. R. 4115. * * *" (H. Rep. No. 1289 (to accompany H. R. 4115), 78th Congress, 2d sess., March 27, 1944, p. 6.)

784609—48——4

sion did not abuse its authority in adopting the challenged regulation.

II

SUBGROUP A–1 PLUS IS BOTH WARRANTED AND REQUIRED BY SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT, AND THE COMMISSION'S REGULATION RECOGNIZING THAT FACT IS VALID UNDER SECTION 12 OF THE VETERANS' PREFERENCE ACT

As we have shown above (pp. 17–21), petitioner is not entitled to a declaratory judgment as to the validity of subgroup A–1 Plus unless it be established that subgroup A–1 is invalid and, even in that event, he has made no showing that he is entitled to a declaration as to the invalidity of subgroup A–1 Plus. Owing to the limited nature of that category (which comprehends veterans of World War II after release from the armed services) and the short tenure assigned to a veteran in that subgroup (one year), it is extremely unlikely that his employment rights would be affected by the existence of that subgroup in the future. It would only assume significance to a person who, unlike petitioner, had a low retention credit.

The validity of subgroup A–1 Plus is not, however, in our view open to serious question. Section 8 (b) (A) of the Selective Training and Service Act provides that a person who, in order to perform training and service under the Act, has left a position and who upon the completion of his service is still qualified to perform

the duties of such position and who makes application for reemployment, shall, if such employment was in the employ of the United States Government, be restored to such position or to a position of like seniority, status, and pay. Section 8 (c) of the Act provides that anyone restored to a position in accordance with the provisions of paragraph (A) "shall not be discharged from such position without cause within one year after such restoration." The directive to reemploy is mandatory and the prohibition against discharge is unconditional. This Act was not one of the group purportedly changed by the Veterans' Preference Act of 1944, and so remains in full force and effect. H. Rep. 1289, 78th Cong., 2d Sess. (1944), p. 7. It seems clear beyond dispute that when the Commission was establishing regulations setting up retention subgroups, it was compelled to recognize the existence of the statutory reemployment rights of returning veterans for one year and to establish an appropriate category for them. The creation of subgroup A–1 Plus was an appropriate response thereto.

Petitioner, however, contends that the decision of this Court in *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275,[29] holds that the restoration to a former position is not required by Section 8 (b) of the Selective Training and Service Act where it would re-

[29] He also relies upon dicta in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40.

quire the displacement of an individual having greater seniority than the returning veteran. But the *Fishgold* case dealt only with situations where the veteran had returned to private employment and where there was involved a union contract providing that furloughs or separations from the service of the employer were to be effected in the order of seniority when a reduction in force occurred. Even then, this Court did no more in the *Fishgold* case than hold that a short furlough pursuant to the terms of the union seniority contract did not constitute a discharge within the meaning of Section 8 (c) of the Act. Neither that case nor the *Whirls* case purports to deal with the situation where the employer was the United States and where the incidents of seniority were fixed not by any union contract but by statute, or by appropriate regulations of the Civil Service Commission. The Attorney General in an opinion dealing with this precise problem has construed the decision in the *Fishgold* case as having no impact upon the regulation establishing the A-1 Plus category. 40 Op. A. G. No. 115 (September 20, 1946). The *Whirls* case is, of course, even more remote from the question involved because there the year of reemployment accorded the veteran by Section 8 had already expired.

That Section 8 of the Selective Training and Service Act was intended to secure to a returning veteran the right of absolute reemployment seems

clear from the difference in language used in Section 8 (b) (A) and Section 8 (b) (B). In the case of the Government the duty to reemploy was absolute. This obligation the Government could impose upon itself without any qualification because it was the employer. In so far as the private or nongovernmental employer was concerned, the reemployment obligation was qualified to the extent that no obligation to reemploy was imposed upon him if he could show that his "circumstances have so changed as to make it impossible or unreasonable to do so."

Moreover, in view of the widespread interest in the manner in which the Executive Branch of the Government is enforcing the various statutes which have been enacted for the benefit of veterans, Congress is undoubtedly aware of the retention priority accorded returning veterans pursuant to Section 8 of the Selective Training and Service Act. Not only in its published regulations, but also in its Annual Report for 1945 (p. 25) the Commission has publicized the one-year retention preference embodied in subgroup A-1 Plus. Yet Congress has made no effort to change the administrative policy, which has been to accord a full year's employment to a returning veteran irrespective of the fact that such retention may cause the displacement of persons with greater seniority, including veterans as well as nonveterans. It is almost two years since the *Fishgold* case was decided by this Court and, while

we recognize that inaction by Congress cannot always be taken to be an approval of an administrative interpretation of one of its laws, we submit that, in the peculiar circumstances surrounding the reemployment rights of returning veterans, it here should be accorded great weight.

Petitioner finally contends that notwithstanding all the foregoing, the regulations establishing subgroup A–1 Plus should be set aside because the Commission erroneously concluded that it was required by law to establish that particular category, and that it did not do so in the exercise of its informed discretion. To this we submit there are two short answers: The first is that the establishment of that category or one similar to it is probably required by law, and the second is that it is not established that the Commission has retained that category in the belief that it is under a legal compulsion so to do. While it may be conceded that at the time of its original adoption, the Commission felt that it was under legal compulsion to set up that category, and indeed so recited in its regulation, nevertheless following the *Fishgold* decision, the Commission reexamined the problem. It requested and obtained an opinion of the Attorney General (40 Op. A. G. No. 115) and thereupon advised all agencies and departments that the regulation would stand unchanged. In Departmental Circular No. 556, Supplement No. 2 of November 1, 1946, it stated its interpretation of the Attorney General's opinion in the following

language: "2. The Attorney General is of the opinion that 'the regulations of the Civil Service Commission establishing the A–1 Plus retention preference are, * * * valid and designed to effectuate the provisions of section 8' (of the Selective Training and Service Act of 1940)." Thus, the Commission interpreted the Attorney General's opinion as holding that its regulations in so far as the A–1 Plus subgroup was concerned were appropriate, but certainly not mandatory. This is strengthened by the third paragraph of the Circular No. 556, which states: "In view of this opinion, the Commission does not propose to make any change in the retention-preference regulations as a result of the decision of the Supreme Court." This, we submit, rather clearly reflects a judgment independently arrived at, and not one which is compelled by law.

In the light of the foregoing, we submit that while it is unnecessary for this Court to pass upon the validity of subgroup A–1 Plus, nevertheless it is valid and the regulation of the Civil Service Commission establishing it was a permissible and proper exercise of the regulatory power conferred upon the Commission.

III

THE RELIEF WHICH PETITIONER SEEKS IS A LEGISLATIVE AND NOT A JUDICIAL MATTER

Petitioner's whole case resolves itself into the simple proposition that this Court should set aside

Civil Service Commission regulations embodying the express policy which the Government has followed for over seventy years with respect to granting retention preference to veterans. Petitioner's real complaint, and one which is understandable from his viewpoint, is directed against the legislative policy of granting substantial, rather than superficial, retention benefits to veterans. This is evidenced both by his complaint with its supporting affidavit and by his brief in which he reiterates the hardship to which he is being exposed and the deleterious effect on the public service which the Commission's regulations will have. He also, by a series of inferences and intimations, reaches a conclusion as to the statutory mandate which differs from that adopted by the Commission and urges that his interpretation should be adopted by the courts and thus should govern the Commission in promulgating regulations. The judicial relief which he seeks is not only opposed to the clearly demonstrated legislative intent (see *supra*, pp. 30–35), but is one which if granted would substitute the judicial process for the informed administrative process entrusted to the Commission by the statute. We submit that any relief which he obtains must be afforded by Congress.

Wide discretion in the adoption of regulations was conferred by the Veterans' Preference Act upon the Commission. Certain standards were prescribed but these in turn were not spelled out in

detail and were also subject to previous and other legislation.[30] It was a field in which the Civil Service Commission was through long experience peculiarly equipped to act. It is well settled that the interpretation of a statute by the agency of the Government charged with its administration is entitled to great weight in the courts. See *Billings* v. *Truesdell*, 321 U. S. 542, 548; *Gray* v. *Powell*, 314 U. S. 402, 412–413; *United States* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534, 549; *United States* v. *Jackson*, 280 U. S. 183, 193. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Lucas* v. *American Code Co.*, 280 U. S. 445. In the instant case, the Civil Service Commission has interpreted the Veterans' Preference Act, particularly Section 12, as granting to veterans a retention priority over non-veterans without regard to length of service. Such an interpretation, as we indicated, *supra*,

[30] Petitioner cannot successfully assert that the Civil Service Commission was not a proper administrative body to which to entrust the enforcement of the Act. The Civil Service Commission is sensible of the role which a sound and stable career service plays in our Government and its sixty-four years of existence are a history of unremitting effort to strengthen and enlarge the merit system. The granting of preference in employment to men and women who have served faithfully in the armed forces is also a well-established legislative policy of even longer standing than the Civil Service Act. The Commission's duty as an arm of the Executive Branch of the Government is to effectuate the legislative policy enunciated in these statutes, as well as the policy implicit in the Civil Service Act.

pp. 23–30, merely expresses a well-established policy of long standing. The regulations which were promulgated pursuant to this interpretation conform to the statutory mandate, and there exists no grounds for their modification by this Court. Cf. *United States* v. *Philbrick,* 120 U. S. 52, 59; *United States* v. *Hill,* 120 U. S. 169, 182; *Robertson* v. *Downing,* 127 U. S. 607, 613; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1, 13; *New York, C. & St. L. R. Co.* v. *Frank,* 314 U. S. 360, 372–373.

We do not attempt to minimize the loss sustained by a nonveteran in being separated from government employment after many years of faithful service in order to make way for veterans who are his juniors in service. That, however, is a hardship which can be relieved by Congress alone. And Congress is cognizant of the fact that nonveterans with many years of service are being discharged as a result of the operation of Section 12 of the Act.[31] However, it has not seen fit to enact any amendment to the Act.[32] And that, we submit, is the only manner in which petitioner can obtain relief, for the regulations of the Commission, as a result of which he was separated from government service, find adequate support in the statute.

---

[31] The Act of August 8, 1946, 60 Stat. 939, granted special pensions to employees over fifty-five years of age who are involuntarily separated in reduction of force after twenty-five years of service.

CONCLUSION

For the reasons stated, the decision below should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
ROBERT W. GINNANE,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
MELVIN RICHTER,
EMERY COX, Jr.,
Attorneys.

APRIL 1948.

---

[32] A bill now pending, S. 2327, 80th Cong., 2d sess., would amend Section 12 to read:

"SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees with less than ten years of total service and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees with less than ten years of total service who have equal or lower efficiency ratings: * * *"

APPENDIX A

The Veterans' Preference Act of June 27, 1944, c. 287, 58 Stat. 387 (5 U. S. C., Supp. V, 851–869) provides in pertinent part as follows:

* * * * *

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who

served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), and (3), and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided,* That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by a concurrent resolution of the Congress for such other positions as may from time to time be determined by the President.

* * * * * *

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the

same rating: *Provided*, That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

* * * * *

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employ-

ment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

* * * * * *

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

* * * * * *

The Selective Training and Service Act of September 16, 1940, c. 720, 54 Stat. 885 (50 U. S. C. App. 301 *et seq.*) provides in pertinent part as follows:

* * * * * *

SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes

application for reemployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

APPENDIX B

The pertinent retention regulations of the Civil Service Commission in force at the time petitioner was furloughed, 5 C. F. R. (1945 Supp.) 12.302 *et seq.*, as amended by 11 Fed. Reg. 8205, 9003, 9977, provide:

§ 12.302 *Definitions.*—For the purpose of §§ 12.301 to 12.314, inclusive, definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former employee with established reemployment or restoration rights, or for other reasons. However, the term does not apply to (1) termination of temporary appointments limited to one year or less, (2) retirement of employees, or (3) separations for unsatisfactory service.

(b) "Retention groups" and "subgroups" means classes of employees entitled to the same degree of retention preference on the basis of tenure of employment and veteran preference.

(c) "Retention credits" are credits for length of service and efficiency ratings in determining retention order in each retention subgroup. They are computed by

allowing one point for each full year of Federal Government service plus five points for an "Excellent" efficiency rating, three points for a "Very Good" efficiency rating, and one point for a "Good" efficiency rating. This paragraph shall be effective with respect to notices in reductions in force issued on and after September 15, 1946, or with respect to individual agencies, at any date prior thereto at the option of the agency: *Provided,* That, with respect to ungraded positions under the Navy Department this paragraph shall be effective on October 15, 1946.

(d) "Federal Government service" means the total of all periods of service eligible for consideration for civil service retirement purposes, without regard to whether the employee is eligible or will be eligible actually to receive retirement benefits. All active military service is counted whether or not veteran preference is given therefor or whether it is eligible to be considered for civil service retirement purposes. Total service shall consist only of full years of creditable service, but fractions of a year shall be considered in arriving at the total.

(e) "Efficiency rating" means (1) for employees paid under the compensation schedules of the Classification Act of 1923 as amended or of Executive Order No. 6746, the current official efficiency rating under the Uniform Efficiency Rating System; and (2) for other employees the current efficiency rating system which is in general compliance with the uniform system.

Administratively adopted efficiency rating systems not in general compliance with the uniform system may be used for de-

termining retention credits with the prior approval of the Commission.

(f) "Veteran preference employee" means an employee entitled to veteran preference under the Veterans' Preference Act of 1944.

(g) "Department" means an entire executive department, parent organization with constituent agencies, independent establishment, government-owned or government-controlled corporation of the Federal Government, the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the executive branch of the Federal Government created by Act of Congress or Executive order.

(h) "Governmental entity" means a department, bureau of a department, parent organization, constitutent agency, independent establishment, entire field installation, regional office, or field station, an operating department of the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the Federal Government created by Act of Congress or Executive order.

(i) "Competitive area" means a governmental entity, a combination of governmental entities, or that part of a governmental entity for which approval has been secured from the Commission, within which employees of a competitive level are considered to be in competition.

(j) "Competitive level" means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible.

§ 12.303. *Retention preference; classification.*—For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating less than "Good".

A–2 Without veteran preference unless efficiency rating is less than "Good".

A–3 With veteran preference where efficiency rating is less than "Good".

A–4 Without veteran preference where efficiency rating is less than "Good".

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good".

B–2 Without veteran preference unless efficiency rating is less than "Good".

B–3 With veteran preference where efficiency rating is less than "Good".

B–4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good".

C–2 Without veteran preference unless efficiency rating is less than "Good".

C–3 With veteran preference where efficiency rating is less than "Good".

C–4 Without veteran preference where efficiency rating is less than "Good".

APPENDIX C

MARCH 29, 1948.

The Honorable JOHN L. SULLIVAN,
Secretary of the Navy, Washington, D. C.

Re: *Earle W. Hilton* v. *John L. Sullivan, et al.* In the Supreme Court of the United States, No. 560, October Term, 1947.

MY DEAR MR. SECRETARY: Petitioner, a non-veteran, instituted the above-captioned suit as an action for a declaratory judgment, mandamus and other relief, alleging that he had been unlawfully discharged from his position as leadingman shipfitter at the Charleston, South Carolina, Navy Yard. Petitioner had been placed in retention subgroup A–2 by the Commandant of the Yard, and was furloughed during a recent reduction in force. He attacks the validity of the Civil Service Regulations (5 C. F. R. 12.301 *et seq.*) and the Navy Department Regulations (NCPI 170, Rev. II, as amended) which were promulgated pursuant to the Veterans' Preference Act of 1944, alleging that the establishment of A–1 and A–1 plus retention subgroups was not required by law and constituted an abuse of administrative discretion on the part of the Civil Service Commission. He seeks reinstatement to his former position.

Among the points which petitioner urges is that 61 of the men listed in the A–1 plus group on the shipfitters retention register at the Charleston Navy Yard were listed as "no efficiency". He argues that these men had a "less than good"

efficiency rating and, accordingly, should have been placed in retention group A–3. From this he infers that, had they been so placed, he would not have been furloughed.[1]

I understand that, at the time involved (November, 1946) shipfitters, by regulation, were subject to receiving official efficiency ratings semi-annually, with the exception that if an official efficiency rating became necessary prior to the semi-annual date in order to determine the employee's rights, such as for pay increases or retention purposes, a "special" efficiency rating would be made. Pertinent reduction in force regulations provided that an efficiency rating was needed for determining retention credits only within a subgroup where some but not all of the employees were being reached for action such as demotion, furlough, or separation. As none of the A–1 plus shipfitters were being reached for such action, it was believed no efficiency ratings were needed for the 61 shipfitters in subgroup A–1 plus classified "no efficiency".

I understand further that all of the shipfitters in the A–1 plus subgroup, with the exception of one, listed "no efficiency" in November, 1946, were subsequently rated "good" (or better); that the one man who did not receive an efficiency rating because of the regulations then in force at the Yard had resigned; that at the present time there are no shipfitters at the Charleston Yard who are either in group A–1 plus or in A–2; and

[1] 57 of the men listed in the A–1 plus retention group were given efficiency ratings of "good" (or better) as were all of the men listed in the A–1 retention group. 23 men in the A–2 retention group were listed as either "A Non Vet. No. Efficiency" or "A–2 No Efficiency".

that, at present, all shipfitters at the Yard are listed in retention group A–1.

The record also discloses that 23 men were listed generally in group A–2 and rated no efficiency, but fails to suggest the reason for this rating. Also there seems to be some confusion in respect of this particular group. One subgroup is listed "A Non Vet. No Efficiency" and the other is listed as "A–2 No Efficiency". Information in respect of this group of 23 men would be helpful.

The information outlined above is requested so that we may be in a position to reply to the argument which petitioner has made. If my understanding is incorrect then we have a duty to the Court to explain why certain personnel rated "no efficiency" were placed above petitioner in the retention register at the Charleston Yard.

Sincerely yours,

For the Attorney General:

H. G. MORISON,
Assistant Attorney General.

THE SECRETARY OF THE NAVY
WASHINGTON

1 APRIL 1948.

Honorable TOM C. CLARK,
Attorney General of the United States,
Department of Justice, Washington, D. C.

Re: *Earle W. Hilton* v. *John L. Sullivan, et al.* In the Supreme Court of the United States, No. 560, October Term, 1947.

DEAR MR. CLARK: Reply is made to your letter of 29 March 1948 relative to the above-captioned matter.

In answer to your inquiry concerning the sixty-one employees who appeared on the retention register in the A–1 plus group listed "no efficiency", this group of restored veterans were listed in this manner because at the time the retention register was prepared (November 1946) Shipfitters were subject to receiving official efficiency ratings semi-annually and the group of sixty-one had not been on the rolls of the Shipyard subsequent to their return from military service at the time the regular official semi-annual efficiency rating marks were assigned. Accordingly, no efficiency rating marks appear on the retention register for these employees. You are correct in your understanding that subsequently all employees in this group were assigned efficiency ratings of "good" or better with the exception of one employee (Paul E. Pearce) who resigned prior to the date he would have received a rating.

Relative to your inquiry concerning the twenty-three employees in group A–2 who appear on the retention register "no efficiency", I am informed that the reason this group appears in this manner is due to the fact that these employees in the A–2 group also had not been in Shipfitter positions on the date when semi-annual ratings were assigned. Included in this group were former supervisors who had been recently demoted to Shipfitter and employees who had recently transferred to the shop from other shops or activities, and whose previous efficiency ratings therefore were not considered appropriate. It was not deemed necessary to request special official efficiency ratings for this group for reduction in force purposes because the reduction in

force program in process at the time contemplated and did separate from the rolls all Shipfitters, including Mr. Hilton, in the A–2 group. Therefore, even if the highest efficiency ratings had been assigned to the twenty-three employees it would not have been possible to retain them in the service as Shipfitters.

For your further information, the latest retention register of the Shipfitting Shop at the Charleston Naval Shipyard reveals that at the present time there remain no employees in the retention group A–2, that there are eleven employees in group A–1 plus, and that all of the other Shipfitters are listed in group A–1. All employees in the A–1 and A–1 plus subgroups have current efficiency ratings of "good" or better.

You are correct in all other assumptions outlined in your letter of 29 March.

Sincerely yours,

(s) M. E. ANDREWS,
Acting Secretary of the Navy.

U. S. GOVERNMENT PRINTING OFFICE 16-71048